Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-92-6*

FACTS:

You are counsel for Nicholson Construction Company (Nicholson), a corporation specializing in underground construction and excavation support work.

As general contractor, Nicholson bid on, and was awarded, a contract with the Massachusetts Department of Public Works (DPW).[1/] This contract, part of the Central Artery/Third Harbor Tunnel Project (CA/T Project), requires investigating the performance of tiedown anchors and anchor piles before construction of certain Central Artery tunnel segments begins.

The contract's bid documents did not require, and Nicholson did not provide to DPW, the names of any individual Nicholson employees who might help perform the contract. The contract did require Nicholson to submit to DPW for its approval, after the contract award, the names and "detailed experience records" of at least two supervisory personnel with sufficient experience, and of an "authorized person" with authority to act for Nicholson. Nicholson maintains a permanent staff of over 200 employees, of whom more than one-third are experienced supervisory personnel. After the contract award, Nicholson did submit several names and "records" to DPW at various times. DPW either routinely approved these submissions or took no action (which Nicholson took to be approval). To Nicholson's knowledge, no one at DPW knew any of the personnel whose names Nicholson submitted.

Nicholson wishes to perform work as a subcontractor on one or more CA/T contracts over the next year.

QUESTIONS:

1. Is Nicholson or any of its employees a "state employee" under G.L. c. 268A?

2. If neither Nicholson nor any of its employees is a "state employee," do the second and third sentences of G.L. c. 268A, §1(q) apply to any of them?

ANSWERS:

1. No.

2. No.

DISCUSSION:

1. Is Nicholson or any of its employees a "state employee"?

For the conflict law to apply here at all (except for the possible interpretation presented by your second question and discussed in part 2), Nicholson or one or more of its employees must be a "state employee," defined by G.L. c. 268A, §1(q) as:

> a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o)

or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractor or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof.

This question can be answered simply by considering the first sentence of this definition. As to Nicholson itself, "[t]he Commission has long recognized that a . . . contract between a [state or municipal government entity] and a corporation will not render the corporation a `[government] employee.'" *EC-COI-89-6. See EC-COI-84-5; 83-89.* The Commission has followed the Attorney General's previous view that "the provisions of the conflict of interest statute are primarily directed at the activities of individuals . . . ." *AG Conflict Opinion Nos. 852* (1978), *756* (1977). Therefore, Nicholson itself is not a "state employee."

When a corporation contracts with a state agency, the corporation's employees will also not be considered "state employees," unless the agency "specifically targets a certain individual within the corporate structure to perform the services . . . ." *EC-COI-89-6.* For this purpose, the Commission will examine the following five factors:

(a) are the individual's services expressly or impliedly contracted for?

(b) how large is the entity? how many employees?what types of services are provided by it?

(c) to what degree is specialized knowledge or expertise required in the performance of the services?

(d) to what extent does the individual personally perform the services under the contract, and to what extent does he or she control and direct the terms of the contract or the services provided thereunder?

(e) has the person performed similar services in the past to the public entity?

EC-COI-89-35; 89-6; 87-19; 87-8.

Here, DPW's contract did not specify or otherwise "target" any particular Nicholson employee. DPW's routine approval of (or non-action on) Nicholson's submissions after the contract award supports the view that it had no interest in any particular individual's services. Nicholson is a sizable corporation employing many different supervisory employees capable of performing the contract. Although some expertise might well be required, no particular Nicholson employee could be expected in any substantial way to control or direct the contract services, as shown by occasional changes in supervisory roles, all acquiesced in by DPW. Finally, there is no evidence that DPW knew or cared that any Nicholson employee had performed similar services for it in the past.

We conclude that neither Nicholson nor any of its employees is a "state employee" as defined by §1(q).

2.Do the second and third sentences of §1(q) apply to Nicholson or any of its employees, although none of them is a "state employee"?

The second and third sentences of the definition of "State employee" in G.L. c. 268A, §1(q) exempt from the first sentence's principal definition certain construction contractors and their personnel who participate as consultants in engineering and environmental analysis of major state construction projects. The third sentence's proviso then requires that "no such contractor or personnel" may bid on or be awarded a construction contract for the same project for which they participated in that analysis. Although the Commission has considered the scope of this exemption once before, *see EC-COI-83-165* (exhibit design was not "engineering and environmental analysis"), we have never had occasion to consider the scope of application of the third sentence's proviso.

Your question asks, in essence, whether this proviso should be read merely as a limitation on the exemption contained in the remainder of these two sentences (thus limiting its reach to persons, not including Nicholson or its employees, who would otherwise be "state employees" under the first sentence), or whether instead it was meant to bar all contractors (presumably including corporations like Nicholson) and their personnel from bidding

on state construction contracts if they participated as consultants in the engineering and environmental analysis of the same construction project. The statute's plain language, structure, and legislative history cause us to reject this sweeping second interpretation in favor of the narrower first construction.

We are conscious that a statute is to be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984) (quotations and citations omitted). Here, the plain language of these second and third sentences is designed to address the concerns of construction contractors and their personnel, who might under some circumstances be considered "state employees" under the first sentence because of their prior consultant role in engineering and environmental analysis for major state construction projects. Such "state employees" might be barred from participating in other state construction contracts either by G.L. c. 268A, §5 (as former state employees) or by §7 (as present state employees). The second and third sentences allow such persons, who would otherwise be "state employees" under the first sentence, to participate in state construction contracts for projects other than those in which they participated in the engineering or environmental analysis.

The word "such," modifying "contractor or personnel" in the proviso, may be thought ambiguous: it could refer to all contractors or personnel who participate in the engineering and environmental analysis mentioned in the second sentence (thus supporting the broader second interpretation). Alternatively, it could refer only to contractors or personnel who participated in that analysis and who would be "state employees" under the first sentence but for this exemption (thus supporting the narrower first construction). This ambiguity is resolved by noticing that the same phrase, "[s]uch contractors or personnel," appears at the **beginning** of the third sentence. This phrase's use there, allowing award of state construction contracts and continuation of existing state construction contracts, makes sense only if the narrower meaning is intended, since the concern motivating this exemption applied only to "state employees" under the original first sentence. The same phrase must be given the same meaning when used later in this sentence. *See Beeler v. Downey*, 387 Mass. 609, 619 (1982).

The structure and location of the third sentence's proviso are noteworthy. First, the Legislature placed it in the conflict law's definition of "state employee," certainly an odd place to insert a substantive restriction on contractors who are, by the broader interpretation's hypothesis, **not** state employees otherwise subject to G.L. c. 268A; a more likely location if the broader interpretation were intended would be in another statute concerning construction contract bidding procedures, such as G.L. c. 30, c. 30B or c. 149. Second, it is phrased as a proviso that explicitly modifies the preceding exemption, a sentence structure that is sensible only if the narrower construction is intended. *See EC-COI-87-36; 82-106* (both concluding that provisos limiting "selectman's exemption" from G.L. c. 268A, §20 did not apply to selectmen who are special municipal employees and thus not in need of this exemption).

The legislative history of this statute is also helpful. When G.L. c. 268A was originally enacted, by St. 1962, c. 779, §1, the definition of "state employee" consisted solely of the present first sentence. The present second and third sentences were added by St. 1977, c. 245, entitled "An Act authorizing certain construction contractors to participate in state projects."[2/] The Act resulted from a substantially identical bill, House No. 2843 (1977), sponsored by then-Representative William Q. MacLean, Jr., and originally entitled "An Act to expedite the employment of construction tradesmen on major construction projects." This original bill contained the following preamble explaining its purpose:

> **Whereas,** the provisions of Chapter 268A restrict the participation of construction contractors as consultants or members of a consulting group in the engineering and environmental analysis for major construction projects, and
>
> **Whereas,** the best interest of the Commonwealth require [sic] such participation, and
>
> **Whereas**, such participation can be permitted without impairment of the legislative purpose in the enactment of General Laws Chapter 268A.

The only written comment on the bill in the Governor's legislative file was from the Executive Office of Administration and Finance. After urging the Governor to sign the bill, it briefly referred to the third sentence's

proviso as a "necessary safeguard" that was thought "satisfactory," an afterthought hardly describing a sweeping new restriction on bidding by construction contractors.

This unusually clear and consistent legislative history discloses no legislative purpose to impose further restrictions on any construction contractors. Rather, the clear intent was to carve out an exemption for certain contractors who had done engineering and environmental analysis, but to avoid "impairment of the legislative purpose" of G.L. c. 268A by limiting this exemption to those whose analysis was not for the same project.

Our duty is to "give the statute a workable meaning." *Graham v. McGrail*, 370 Mass. 133, 140 (1976). For the above reasons, we conclude that the 1977 amendment, adding the second and third sentences of §1(q), was intended solely to create an exception from the pre-existing first sentence, thus tempering the conflict law's application to construction contractor employees under the specified circumstances. It follows that the second and third sentences, and particularly the third sentence's proviso, cannot apply to a person or entity (including Nicholson and each of its employees) that is not a "state employee" as defined by the first sentence.[3/]

Date Authorized: March 12, 1992

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1/]As of April 8, 1992, the state DPW becomes known as the state Department of Highways. St. 1991, c. 552.

[2/]Courts have looked to an act's title for aid in ascertaining legislative intent. *See Hemman v. Harvard Community Health Plan, Inc.*, 18 Mass. App. Ct. 70, 73 (1984).

[3/]Since by answering your first and second questions we have concluded that G.L. c. 268A does not apply at all to Nicholson or any of its employees, it is unnecessary to answer your remaining questions.